

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS ON BEHALF OF  
THE SECRETARY OF STATE**

**STATE OF COLORADO**

**CASE NO. OS 2004-0027**

---

**AGENCY DECISION**

---

**IN THE MATTER OF THE COMPLAINT FILED BY MANOLO GONZALES-  
ESTAY REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE  
VIOLATIONS BY CITIZENS FOR SENSIBLE ENERGY CHOICES**

---

This matter is before the Division of Administrative Hearings (Division) on the complaint of Manolo Gonzales-Estay (Complainant) against Citizens for Sensible Energy Choices (Citizens or Committee). The complaint was filed with the Colorado Secretary of State on October 14, 2004. The Secretary of State referred the complaint to the Division as required by Colo. Const. art. XXVIII, sec. 9(2)(a). The complaint alleges that Citizens violated certain provision of the Fair Campaign Practices Act (FCPA)<sup>1</sup> by failing to report non-monetary contributions it received from Xcel Energy, namely the value of Xcel Energy's September 2004 newsletter that was sent to Xcel Energy's customers with their monthly utility bills in October 2004.

The hearing on the complaint was conducted in Denver, Colorado, on December 8, 2004 before Administrative Law Judge (ALJ) Michelle A. Norcross. The hearing was digitally recorded in Courtroom E. The Complainant was represented by Mark Bender, Esq. Citizens was represented by Christopher R. Paulson, Esq. Complainants' exhibits 1, 2, 3, and 5 were admitted into evidence. Citizens' exhibits A through G were also admitted into the record.

The ALJ issues this Agency Decision pursuant to Colo. Const. art. XXVIII, sec. 9(1)(f), (2)(a) and Section 24-4-105(14)(a), C.R.S. (2004).

**Matters Raised At Hearing**

At hearing, Complainant made an oral motion to amend the complaint to include additional campaign violations concerning an October 2004 bill insert that Xcel Energy mailed to its customers in November 2004. Citizens objected to Complainant's motion to add additional charges to the complaint on the day of hearing. In ruling on a motion to amend, the court must consider the totality of

---

<sup>1</sup> Section 1-45-101, *et seq.* C.R.S. (2004)

the circumstances by balancing the policy favoring the amendment of the pleadings against the burden which granting the amendment may impose on the other parties. *Polk v. Denver Dist. Court*, 849 P.2d 23 (Colo. 1993).

Due process requires that a party responding to a complaint receive adequate notice of the charges it will be required to defend against. In the instant case, Respondent had no prior notice that Complainant wished to add additional counts of campaign violations to the complaint and was unprepared to address additional charges on the day of hearing. Accordingly, the ALJ denied Complainant's motion to amend the complaint.

### **Parties' Positions**

Complainant's Position. Complainant contends that Citizens violated the FCPA by failing to disclose the non-monetary contributions it received from Xcel Energy, namely the value of the September 2004 newsletter that Xcel Energy mailed to its customers along with their bills in October 2004. And based on this failure, Citizens failed to comply with the reporting requirements of the FCPA.

In his complaint, Complainant also alleges that Xcel Energy's use of "ratepayer dollars to pay for a political communication is a clear violation." The question of whether Xcel Energy used corporate or ratepayer dollars to pay for the September 2004 newsletter is not an issue properly before the ALJ. The Colorado Public Utilities Commission has sole jurisdiction over issues concerning Xcel Energy's use of ratepayer money. Moreover, the complaint before the ALJ is filed against Citizens, not Excel Energy.

Citizens' Position. Citizens contends that it did not receive any non-monetary contributions from Xcel Energy. The Xcel Energy September 2004 newsletter was prepared, distributed, and paid for exclusively by Xcel Energy in the regular course and scope of its business. It was not a contribution to the Committee. Therefore, Citizens had no duty to report the value of the newsletter in its reports.

### **FINDINGS OF FACT**

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Citizens is a registered issue committee with the Secretary of State whose purpose was to oppose the passage of Amendment 37. Amendment 37 is a statewide ballot that requires Colorado utilities to increase their renewable energy production from 2% up to 10% by 2015.

2. As an issue committee, Citizens is required to file regular reports with the Secretary of State disclosing the amount of contributions received and expenditures incurred during each reporting period. Pursuant to these requirements, the Committee filed several reports, including a report dated

October 6, 2004 for the reporting period September 16, 2004 through September 29, 2004. The Committee also filed a report on October 20, 2004 for the reporting period September 30, 2004 through October 31, 2004 and one on December 4, 2004 for the reporting period October 14, 2004 through November 30, 2004.

3. Citizens did not disclose receipt of any non-monetary contributions from Xcel Energy in its October 6, October 20 or December 4, 2004 reports.

4. Xcel Energy publishes a monthly customer newsletter titled "Energy Update". Xcel Energy's September 2004 Energy Update (September 2004 newsletter) is the subject of this complaint.

5. In October 2004 Xcel Energy mailed its September 2004 newsletter to its customers along with their monthly utility. The September 2004 newsletter contains an article about the company's position on Initiative 145. Initiative 145 became known as Amendment 37 after the Secretary of State's office certified the issue for the November 2004 ballot.

6. Xcel Energy was solely responsible for drafting the article about Initiative 145. Additionally, Xcel Energy paid for the entire costs of preparing and distributing the September 2004 newsletter.

7. There is no evidence that Citizens participated in the drafting, production, or distribution of Xcel Energy's September 2004 newsletter. There is no evidence that Citizens coordinated or cooperated in any way with Xcel Energy to produce or distribute the September 2004 newsletter.

8. Xcel Energy's September 2004 newsletter was prepared and distributed to its customers within the regular course and scope of its business. It was not prepared on behalf of or at the direction of the Committee. Accordingly, the September 2004 newsletter was not a contribution to the Committee.

## **DISCUSSION**

### **Existence of Contributions**

The Complainants assert that Citizens violated that portion of Section 1-45-108(1)(a)(I) of the FCPA, which provided as follows:

All . . . issue committees shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made; and obligations entered into by the committee or party.

The issue raised is whether Citizens has received a “contribution” within the meaning of the FCPA from Xcel Energy as a result of Excel Energy’s September 2004 newsletter. As relevant to the present case, a contribution is defined as: “The payment, loan, pledge, gift, or advance of money, or guarantee of a loan or the fair market value of any gift or loan of property made to any . . . issue committee . . . [or] [t]he fair market value of any gift or loan of property made to any . . . issue committee. Colo. Const. art. XXVIII, sec. 2(5)(a)(I) and (III).

Xcel Energy’s September 2004 newsletter was prepared and distributed to its customers within the regular course and scope of its business. It was not prepared on behalf of or at the direction of the Committee. Accordingly, the September 2004 newsletter was not a contribution to the Committee.

### **CONCLUSIONS OF LAW**

1. Pursuant to Colo. Const, art. XXVIII, sec. 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.

2. The issues in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII, or Sections 1-45-108, 114, 115, or 117, C.R.S. (2004). Colo. Const. art. XXVIII, sec. 9(2)(a). If an ALJ determines that a violation of one of these provisions has occurred, the ALJ’s decision must include the appropriate order, sanction or relief authorized by Article XXVIII. Colo. Const. art. XXVIII, sec. 9(2)(a).

3. Colo. Const. art. XXVIII, sec. 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)<sup>2</sup>. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against Citizens for violations of the FCPA. Accordingly, Complainant has the burden of proof.

4. The FCPA requires that “All . . . issue committees shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made; and obligations entered into by the committee or party.” Section 1-45-108(1)(a)(I), C.R.S. (2004).

Article XXVIII of the Colorado Constitution defines contribution as follows:

Section 2(5)(a) “Contribution” means:

---

<sup>2</sup> Section 24-4-101, *et seq.*, C.R.S. (2004)

- (I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any . . . issue committee. . . ;
- (II) Any payment made to a third party for the benefit of any . . . issue committee . . . ;
- (III) The fair market value of any gift or loan of property made to any . . . issue committee . . . ;

5. Under Article XXVIII, sec. 2(5)(a)(I) – (III), Xcel Energy's September 2004 newsletter is not considered a contribution under the FCPA.

6. Citizens did not violate Section 1-45-108(1)(a)(I) of the FCPA by failing to report receipt of a non-monetary contribution from Xcel Energy.

### **AGENCY DECISION**

It is the Agency Decision of the Administrative Law Judge that the complaint by Manolo Gonzales-Estay against Citizens is dismissed.

This decision is subject to review by the Colorado Court of Appeals, pursuant to Section 24-4-106(11), C.R.S. (2004). Colo. Const., art. XXVIII, sec. 9(2)(a).

### **DONE AND SIGNED**

December 20, 2004

---

Michelle A. Norcross  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mark Bender, Esq.  
1301 Pennsylvania Street, Suite 900  
Denver, CO 80203

and

Christopher R. Paulson, Esq.  
Friedlob Sanderson Paulson & Tourtillo, LLC  
1775 Sherman Street, Suite 2100  
Denver, CO 80203

on this \_\_\_\_ day of December 2004.

---